

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

MARSHALL DIVISION

CONVOLVE, INC.,

Plaintiff,

v.

DELL INC., *et al.*,

Defendants.

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CIVIL ACTION NO. 2:08-CV-244-CE

JURY TRIAL DEMANDED

**PLAINTIFF CONVOLVE, INC.'S RESPONSE TO WESTERN DIGITAL'S NOTICE TO
THE COURT REGARDING WILLFULNESS
(DOCKET NO. 456)**

Convolve submits this response to address Western Digital's claims of prejudice. *See* Dkt. No. 456. Convolve served its second amended (willfulness) complaint on Defendants' counsel on February 8, 2011. An exact copy of the second amended complaint was submitted as Exhibit 1 to Convolve's Motion for Leave to File, along with all other exhibits to the amended complaint. Dkt. No. 226 – Exs. 1 and A-T. Several months later, in accordance with the Court's order, the second amended complaint was again served on Defendants' counsel on June 15, 2011, when Convolve filed its amended complaint. *See* Dkt. Nos. 362 and 383.

Despite the fact that the amended complaint (Ex. 1 of Dkt. No. 226; and Dkt. No. 383) served February 8, 2011, and again on June 15, 2011, set forth Convolve's willfulness theory with detailed factual support (*e.g.*, Exs. E-Q of Dkt. Nos. 226 and 383), Defendants' counsel never requested permission to disclose the second amended complaint to their clients until the hearing on July 5, 2011.¹ Western Digital's claim of prejudice is belied by the almost five month delay between Convolve's initial service of the second amended complaint and Defendants' counsel July 5, 2011 request for permission to provide it to their clients.

Moreover, in accordance with the Court's motion *in limine* ruling, Convolve served its supplemental responses to the Defendants' willfulness interrogatories (Western Digital's interrogatory no. 14; Hitachi's interrogatory no. 20; and Dell's interrogatory no. 6) on June 30, 2011.² Convolve properly designated these supplemental responses as outside attorneys' eyes

¹ In addition, contrary to Western Digital's assertion, Convolve never represented that the second amended complaint contained third-party confidential information. The second amended complaint was properly filed under seal because the accused products lists at Exhibits R, S, and T include some product model numbers and names identified from Defendants' confidential documents (some of which were designated outside attorneys' eyes only).

² In accordance with its continuing obligation under Federal Rule 26(e), Convolve also served its supplemental responses to Defendants' inducement and contributory infringement interrogatories (Western Digital's interrogatories nos. 10 and 11; Hitachi's no. 9; and Dell's nos. 11 and 12) on June 30, 2011.

only in accordance with Defendants' and third-parties' designations of information quoted and relied upon therein.

On July 1, 2011, counsel for Western Digital asked Convoke, apparently on behalf of all Defendants: "Can we share these amended responses with clients?" Convoke was diligent in notifying counsel for Defendants about all of the confidential information in the supplemental interrogatory responses, and insisted that Defendants' counsel not disclose any third-party confidential information to their clients, and Defendants' counsel get approval from each other before sharing co-defendants' confidential information.

Defendants have suffered no prejudice that is a result of any action or inaction by Convoke.

DATED: July 8, 2011

Respectfully submitted,

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

/s/ Elizabeth V. Thomas

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this motion was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A). Pursuant to Fed. R. Civ. P. 5(d) and Local Rule CV-5(d) and (e), all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by email and/or fax, on this the 8th day of July 2011.

/s/ Elizabeth V. Thomas
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